

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2479

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
GREENE BERRY MULLENS,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK AT CRIMINAL 1973-375.

BRIEF OF APPELLEE AND APPENDIX

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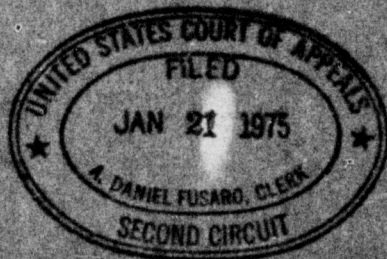


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Docket No. 74-2479

UNITED STATES OF AMERICA,

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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BRIEF OF APPELLEE

Preliminary Statement

The Appellee, GREENE BERRY MULLENS, was indicted on December 12, 1973, on charges of making counterfeit obligations of the United States in violation of Title 18, United States Code, Section 471 and possession of counterfeit obligations in violation of Title 18, United States Code, Section 472.

Pursuant to a Search Warrant obtained by the Buffalo Police Department from a City Court Magistrate on December 7, 1973, the premises of 1536 Jefferson Avenue,

Buffalo, New York was searched wherein a brown paper bag was discovered in the possession of the Appellee's mother, which contained scraps and pieces of counterfeit \$10's and \$20's Federal Reserve Notes.

Subsequently, the Appellee was arrested by the Buffalo Police Department when he surrendered himself at their headquarters in Buffalo, New York.

On the 7th day of March, 1974, his Suppression Motion was commenced against the evidence seized as a result of the execution by the Buffalo Police Department of said aforementioned Search Warrant of 1536 Jefferson Avenue.

A subsequent Hearing was held before the Hon. John T. Curtin on May 14, 1974, whereupon he made his Decision on October 4, 1974, stating that "the Affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit, and so the warrant must fail." [G.A. 12] The Decision rendered by the Court was only partial in nature for, in effect, it did not give the Judge's Decision as to the second part of the Motion of March 7, 1974.

Question Presented

The question presented for the Court of Appeals is whether or not Judge Curtin of the Western District of New York erred when he suppressed a Search Warrant, based on the failure of the Affidavit to provide probable cause for the issuance of said Search Warrant. More specifically, the question simplified is whether or not a Magistrate issuing a Search Warrant may look to information that is not contained in the Affidavit for making his decision as to whether or not to grant a Search Warrant.

Statement of Facts

That on December 7, 1973, a search of 1536 Jefferson Avenue in the City of Buffalo was conducted pursuant to a Buffalo City Court Search Warrant issued by the Honorable Samuel Green on the same day. The law enforcement officials conducting this search included members of the Buffalo City Police Department and members of the United States Secret Service. Said Search Warrant was obtained by Detective Sgt. James D. Hunter, pursuant to his Affidavit attached to said Warrant and made a part of the record in this case. In his Affidavit, Sgt. Hunter indicates that his information was based:

" . . . upon a reliable informant known to me for several years, who in the past has given me information that has led to the arrest and convictions of other persons that he gave me information on, has informed me that the above named person (Berry Mullens) has several hundred ten dollar bills counterfeit that he is attempting to sell and pass the same. This informant gave information that led to the arrest and conviction of one Ronald Kohlman for bank robbery December, 1971 Judge Curtin. Also that on December 5, 1973 informant did see a suit case with the said bills in it at the above address and in the possession of Barry Mullens." [G.A. 6 & 7]¹

That upon entering the premises at 1536 Jefferson Avenue, the law enforcement officers as described above searched the premises and recovered scraps and pieces of counterfeit ten and twenty dollar bills in a brown A & P grocery bag [G.E. 16,² G.B. 2].³ That no other contraband or similar items were found in the apartment. That subsequent thereto, the residents at 1536 Jefferson Avenue,

¹ Reference to Government Appendix.

² Reference to Government Exhibit.

³ Reference to Government Brief on Appeal.

one James Mullens and his wife, were taken to Buffalo Police Headquarters for questioning. Subsequent thereto, the Defendant Greene Berry Mullens, arrived at the Buffalo Police Headquarters upon learning of his mother and father's detention. That after questioning by members of the Buffalo Police Department and the United States Secret Service, the Defendant, Greene Berry Mullens, was willing to "cooperate" with the law enforcement officers in return for a promise that neither his mother nor father would be prosecuted for this crime.

That the Defendant led the law enforcement officials to two locations, thereby resulting in the recovery of counterfeit money plates and a printing press, together with other paraphernalia used in the counterfeiting operation. That prior to this second Search and Seizure, and at times hereafter, the Defendant made oral statements to the aforesaid law enforcement officials. Suppression of said oral statements has not been determined by the Court as of this Appeal [G.A. 12].

ARGUMENT

The Search Warrant obtained by law enforcement officials in this case is invalid as a matter of law, due to the fact that no probable cause existed for its issuance.

The concept of probable cause is central to the law of search and seizure, and a search warrant is valid only if issued upon such probable cause. *Aguilar v. Texas*, 378 U.S. 108, 84 Sup. Ct. 1509 (1964). Essentially, probable cause means reasonable grounds. There is probable cause for the issuance of a search warrant when the facts presented to the issuing Magistrate give him reasonable

grounds to believe that seizable property is at the place or on the person to be searched. *Aguilar v. Texas, supra*.

The Supreme Court has held that probable cause, upon which a warrant to search is issued may be based, in whole or in part, upon information from an informant, i.e., upon hearsay. *Jones v. United States*, 362 U.S. 257, 80 Sup. Ct. 725 (1960); *U. S. v. Ventresca*, 380 U.S. 102, 85 Sup. Ct. 741; *U. S. v. Harris*, 403 U.S. 573, 91 S. Ct. 2075. Probable cause, however, may not be based upon double hearsay. *United States v. Roth*, 391 F. 2d 507 (7th Cir. 1967).

If an Affidavit is based wholly or partially upon an informer's information, the informer's credibility must be substantiated sufficiently to warrant reliance upon it. *McCray v. Illinois*, 386 U.S. 300, 87 Sup. Ct. 1956; *Rugendorf v. United States*, 376 U.S. 528, 84 Sup. Ct. 825. The first requirement in establishing probable cause is that the facts supplied by the informant must be based upon his personal observations. *Aguilar v. Texas, supra*. Furthermore, in warrant cases, the Affidavit in support of the warrant must contain an affirmative allegation that the informant had personal knowledge of the facts he supplied. *Aguilar v. Texas, supra*; *Spinelli v. United States*, 393 U.S. 410, 89 Sup. Ct. 584; *United States v. Davis*, 402 F. 2d 171 (7th Circuit, 1968), or in the alternative, the underlying facts supplied by the informant alleged in the affidavit and corroborated by police investigation must be so detailed as to support an inference of personal knowledge. *Draper v. United States*, 358 U.S. 307, 79 Sup. Ct. 329 (1959); *Smith v. United States*, 358 Fed. 2d 833 (D.C. Circuit, 1966); *Spinelli v. United States, supra*.

The second requirement is that the prosecution must establish that reliance upon the informant's information was justified. Reliance is justified if the facts known to the offi-

cer at the time he makes the arrest or applies for the warrant support the belief that the informant is "credible", or his information is "reliable". *Aguilar v. Texas, supra*. In warrant cases, those facts must be affirmatively alleged in the affidavit in support of the warrant, *Aguilar v. Texas, supra*. The informant's reliability may be established through the informer's past performance with the police officer involved. *McCray v. Illinois, supra*. What constitutes sufficient past experience to qualify an informant as "reliable", however, is not clear. In warrant cases, it is not unusual for a Court to find reliability based on the allegation that the informant has supplied information on several previous occasions and on each occasion the information proved to be accurate, *United States v. Perry, 380 Fed. 2d 356 (2d Circuit, 1967)*.

In the alternative, if such informant's information is not reliable or not proven so, independent investigation by the police should be made to corroborate this information. *Smith v. United States, supra*. To establish that the information is credible, an independent investigation must corroborate some of the incriminating facts supplied by the informant. *Spinelli v. United States, supra; Draper v. United States, supra; Wong Sun v. United States, 371 U.S. 471, 83 Sup. Ct. 407 (1963)*. In warrant cases, the Affidavit must allege the independent investigation that was conducted to corroborate the information. *Aguilar v. Texas, supra*. Without adequate corroboration, information is not sufficient to establish probable cause. *Wong Sun v. United States, supra*.

It is also important to set out in the Affidavit the underlying circumstances by which the informer concludes that illegal activity is being conducted at the premises he so states and by the person he so indicates. *Spinelli v. United*

States, supra. It is clear that an informer cannot state purely conclusory statements without establishing underlying circumstances which, in turn, must be set forth in any supporting affidavit for the search warrant. *U.S. v. Ventresca, supra.* As a result, the search warrant should not be issued for lack of probable cause if the informer merely states his suspicion or belief of the illegal activity. *Recznik v. Lorain*, 393 U.S. 166, 89 Sup. Ct. 342.

The issuing Magistrate, whether he be a Federal Officer or a City or State Officer, must comply with the rules as shown in the Federal Rules of Criminal Procedure, Rule 41 (c):

"A warrant shall issue only on an affidavit or affidavits sworn to before the Federal Magistrate or State Judge and establishing the grounds for issuing the warrant . . . Before ruling on a request for a warrant the Federal Magistrate or State Judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a Court reporter or recording equipment and made part of the affidavit."

It is clear from the testimony of Sgt. Hunter that additional information was given to the issuing Magistrate Greene of the Buffalo City Court. It is quite clear from the aforementioned rule of the Federal Rules of Criminal Procedure that if the Judge considers additional information that is not included in the affidavit, a record should have been made. *United States v. Abbarno*, 342 F. Supp. 599, 609 (W.D.N.Y. 1972); *United States v. Sterling*, 369 F. 2d 799, 802, n.2 (3d Cir 1966), and *United States v. Melville*, 309 F. Supp. 829, 832 (S.D.N.Y. 1970).

Having established what the law is with regard to search warrant affidavits, we are now in a position to analyze the

Affidavit of Sgt. James Hunter with regard to this case. By his own testimony, Sgt. Hunter indicated that he received information from an informant sometime on the evening of the 6th [G.A. 29]. Sgt. Hunter indicated that he went to the address in question, 1536 Jefferson Avenue, after receiving the tip, merely to look at the premises, so he may adequately describe the premises for the purpose of the search warrant. By his own admissions, no other investigation was done to corroborate with this informer's information. By Officer Hunter's own admissions, he had no other knowledge that the Defendant was involved in any counterfeiting and Sgt. Hunter did indicate that he knew the Defendant's record did not include any prior arrests or convictions for counterfeiting [G.A. 33]. In the Affidavit, Sgt. Hunter indicates that the information from the informer was received on December 5, 1973. In his testimony, Sgt. Hunter contradicts himself by saying that he was not sure when the information was received from the informer, and could not pinpoint the time. In addition, Sgt. Hunter indicated that the informer told him the money was in "the front room", but did not indicate any further details regarding the layout of the premises, nor exactly where in the front room the suitcase was located. That at no time did Sgt. Hunter ever record any of this information received from the informer. Sgt. Hunter also indicated that the last time he received reliable information leading to an arrest and conviction was back in November of 1971, almost two years from the date of the Defendant's arrest. In Sgt. Hunter's affidavit, he also indicates that the informer gave him information that the money allegedly possessed by the Defendant was counterfeit and yet, this informer did not give any information in the past with regard to counterfeiting, nor is it indicated the basis for the informer's conclusion that the money he saw was, in

fact, counterfeit. The informer indicated that only ten dollar bills existed and, in reality, tens and twenties were recovered, thereby establishing additional discrepancy. The color of the suitcase was not adequately described in the warrant, although indicated by Sgt. Hunter that the informer told him it was blue. Sgt. Hunter's only belief that the Defendant was at the premises was that he knew from personal belief that the Defendant was opening up a tailor shop there and by the fact that the informer stated that Berry Mullens was there as well. There is no indication that Berry Mullens was living there at the time nor maintained his residence at such.

When we analyze the facts as presented at the hearing and based upon Sgt. Hunter's Affidavit, together with the law as enumerated above, it is clear that probable cause for the issuance of this particular search warrant was not present. As stated previously, a police officer may rely on an informer's information, as long as that information is reasonably corroborated by other matters within the officer's knowledge. *Jones v. United States, supra*. What is presented on the face of the Affidavit and what is presented under oath to the issuing Magistrate or Judge, is the sole criteria by which the search warrant may be judged. Based upon the face of this affidavit, the informer's reliability is established by only one prior incident, approximately two years prior, with no detail as to how this informer led to the arrest and conviction of the defendant in that case. In addition, there is no further evidence or testimony which indicates that additional oral statements were given to Judge Green under oath to substantiate this informer's reliability any further. Based on the *Aguilar case*, the Magistrate must have more information than supplied in this case to conclude that the informant was credible.

We also have the situation where the information given by the informer and/or put forth by Sgt. Hunter on his affidavit, is of such generalizations as to be unreliable on its fact. A conclusion or belief is drawn by the informer that the money was in fact, counterfeit, which as stated above, cannot be put forth. *U. S. v. Ventresca, supra; Recznik v. Lorain, supra*. The specifics as to when and where the informer observed this counterfeit money in the possession of the Defendant is also at most, sketchy, in that it is not indicated where in the residence that the Defendant possessed this money, nor is the suitcase in which it is allegedly within adequately described [G.A. 33-35].

It has been clearly established that no independent investigation was done and it has also been established that Sgt. Hunter knew of no prior arrest or conviction of the Defendant with regard to counterfeiting, nor did he have any independent knowledge that the Defendant was involved with counterfeiting at this time. Sgt. Hunter also was aware and informed by the U. S. Secret Service that no investigation was presently being conducted against the Defendant himself, but were aware that counterfeit money had been circulated several days thereto. There was no evidence or knowledge to connect the Defendant with any of this money up until the informer's "tip". [D.A. 5, 6 and 11]⁴ Finally, the informer was not produced at the hearing and as such, his information given to Sgt. Hunter is suspect at best. Based upon *Rovario v. United States*, 353 U.S. 53, 1957, the informer's disclosure is required where the issue of probable cause is at hand. The requirements for this disclosure will correspond proportionately to the lack of certainty as to the existence or reliability of the informant. As we have just established, the informant's

⁴ Reference to Def. (Appellee's) Appendix.

reliability is weak and as such, he should be produced at a subsequent hearing to corroborate what was put into Sgt. Hunter's affidavit. It has been held that where the search rests solely upon the assertions of an informant, whose assertions are unconfirmed, and whose source of information is not specified, disclosure will be ordered. *People v. Verrechio*, 23 N.Y. 2d 489, 1969.

Conclusion

It is apparent that Judge Curtin reviewed the entire record of the proceedings of March 7, 1973 in reaching his conclusions, that the Search Warrant must be suppressed for failure to comply with various aspects of the Federal Rules of Criminal Procedure, as well as his main reason, that of, the insufficiency of the Affidavit in granting his Suppression. It is for those reasons and the information contained in the Brief of the Appellee, Greene Berry Mullens, that this Court now should sustain the Decision to Suppress.

Respectfully submitted,

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APPENDIX

Excerpts of Proceedings of May 14, 1974.

[111]

Proceedings: May 14, 1974, 2:45 p.m.

Appearances: As before noted.

(Defendant present.)

SAMUEL J. ZONA, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

Cross Examination by Mr. Lalime (Resumed):

Q. Agent Zona, when you met Sergeant Hunter, did he tell you basically what he was looking for? A. Yes.

Q. And what did he tell you? A. He told me that on the evening before which would have been a Thursday, he had been approached by a confidential informant of his who advised that he had seen plates and negatives and counterfeit tens and twenties in the possession of the defendant and that now this was located, this particular suitcase, he said, was located at the defendant's residence at 1536 Jefferson Avenue.

Q. Did he say that he saw the suitcase in his possession in the house or did he say it just the way you said it then?

A. I don't know. I mean this is what he told me. I don't know what his man told him.

[112] Q. All right. Basically what he told you was that he saw the suitcase in the possession of Mr. Mullens? A. Mr. Mullens.

Q. And now this suitcase was in the house? A. Yes.

Q. Did that infer that the informant had been in the house to you or did it infer that he wasn't or she wasn't

S. J. Zona, for Government, Cross.

in the house? A. Didn't infer neither. I didn't think much of it.

Q. Did he say,—did Detective Sergeant Hunter say to you that there was plates and money? A. I believe he did, yes.

Q. Did he say it was in the container? A. He said it was in a suitcase.

Q. Did he describe the suitcase to you? A. No, he did not.

Q. Did he tell you where the suitcase was located? A. At the house.

Q. Just at the house? A. Just at the house.

Q. Did he describe the house to you? A. No.

Q. But you did look at the affidavit? A. Yes, I did. In fact, I obtained a copy of the affidavit and a copy of the search warrant.

[113] Q. And it said for the premises under the control of the Mullenses at 1536 Jefferson Avenue, is that right? A. I don't have it in front of me. I am sorry.

Q. Did you find a suitcase full of money or counterfeit money at 1536? A. There are two questions there.

Q. Did you find a suitcase full of money at 1536? A. No.

Q. Did you search the lower premises at 1536 Jefferson Avenue? A. No.

Q. Did you find a suitcase at the premises of 1536 Jefferson Avenue? A. We found several suitcases.

Q. Several suitcases, and what color, do you recall off-hand? A. No, sir.

Q. Did you take any of these suitcases for identification or for evidence at a later date? A. No, sir.

Q. And you didn't think this was necessary at this time? A. No, sir. They were full of clothes.

S. J. Zona, for Government, Cross.

Q. They were all full of clothes? A. The ones I recall looking through.

Q. And none of them had plates or money in them, did they? A. None of the suitcases, no.

[114] Q. Now, the first time that you met Greene Berry Mullens was down at Police Headquarters, is that right?

A. Yes, sir.

Q. And you said—

The Court: Excuse me, Mr. Lalime. Go ahead, Mr. Lalime.

By Mr. Lalime:

Q. Agent Zona, what time was this at Police Headquarters that you first saw Mr. Mullens? A. Again, 2:15, 2:30 p.m.

Q. And was he in custody at the time? A. He was in one of the offices there. He was being,—yes, he was being detained.

Q. And you talked to him at that time? A. I didn't hear your question.

Q. Did you start to talk to him? A. Yes, I did.

Q. And you told him that in essence, "Berry, we have the goods on your mother in view of the fact that she had the counterfeit money in her possession", is that right? A. Well, I told him that she was in a lot of trouble and he admitted to that.

Q. Give me what you said in essence, please. A. In essence after I was introduced and Mr. Hunter advised me he had been advised of his rights he had already gone [115] through part of the situation and I said "Well, you know we have your mother, she sat on the bag of counterfeit money and we are looking for complete cooperation on your part".

S. J. Zona, for Government, Cross.

Q. And did you tell him at that time that if he would come clean and give you the information that you wanted concerning the counterfeit money and the plates that you wouldn't press charges against his mother? A. It wasn't just his mother was involved in the discussion. It was everybody. He said he didn't want to involve anybody whatsoever.

Q. But anybody didn't have possession of the counterfeit money. It was his mother that had possession of the counterfeit money, is that right? A. Yes.

Q. And that is the one you had, quote, the goods on, at that time, is that right? A. Yes.

Q. And that's what he knew when he got to that Police Headquarters, that his mother had been detained by the Buffalo Police Department for possession of counterfeit money, is that right? A. I don't know.

Q. You don't know? A. What he knew.

[116] Q. But you knew that she was down there? A. Yes.

Q. And you knew that she wasn't charged yet, is that right? A. I didn't know if she was or not.

Q. By the way, Agent Zona, has she ever been charged with a Federal crime? A. Has she?

Q. Has she, yes. A. Not to my knowledge. I have never done any background work on her. I don't know whether she has ever been charged or not. I don't know.

Q. Do you know if previously to this arrest and search of Greene Berry Mullens that he was charged with a Federal crime? A. Previous, no.

Q. Did you have any previous investigations concerning Mr. Greene Berry Mullens' distribution, issuance or otherwise handling counterfeit money? A. Of the defendant, no.

S. J. Zona, for Government, Cross.

Q. You had no prior communications with Detective Sergeant Hunter regarding counterfeit money in the Buffalo area, is that right? A. That's correct.

Q. Now, Agent Zona, you said that you were accompanied,—that you accompanied Mr. Mullens, Detective Sergeant [117] Hunter and Agent— A. Brehm.

Q. Brehm to some premises on Wakefield Street? A. Yes.

Q. And at that time Mr. Mullens took Mr. Hunter into the premises at 25 Wakefield, was it? A. I believe it was 25, yes, sir.

Q. And do you know was there any consent to search or any permission asked of Mr. Mullens to search these premises at 25 Wakefield? A. He took us there completely voluntarily.

Q. And at that particular place you saw a newspaper that had wrapped around,—been wrapped around counterfeit plates, is that right? A. Well, we went around the corner and opened it up at that time.

Q. All right. And was it a Buffalo paper? A. Yes, I believe it was.

Q. And do you recall the date on that paper? A. No, sir, I do not.

Q. Could it have been the 6th of December? A. I don't recall.

Q. Do you have that in evidence here today? A. The newspaper?

Q. It wasn't introduced. It wasn't introduced, but as far [118] as you know there was no waiver or consent given by Mr. Mullens to Detective Sergeant Hunter? A. It was a consent but it was oral.

Q. It was given in your presence, was it? A. Yes.

S. J. Zona, for Government, Cross.

Q. And again he was advised of his rights he didn't have to allow the search of these premises and so forth?

A. Well, I never gave him his rights at that point. I don't know about Mr. Hunter. During the entire trip in the car he was making statements, to the various places, he was making statements and completely cooperative the whole while.

Q. Now we come to Government Exhibit marked Number 9 for identification which is the waiver of rights. Now, this is the warning that you normally give to an individual, a subject that is in custodial care, is that right, or if you want to search the premises of an individual, this is the usual waiver of rights, is that right? A. No. This is a waiver of rights in regards to statements, nothing to do with search.

Q. And if you follow the warning of the waiver of rights down on Government Exhibit Number 9 to the part where it says "Waiver of rights" in bold print— A. Yes.

Q. Would you read the fourth sentence on that waiver of [119] rights. A. "No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

Q. Now, the threat of the fact that you stated to Mrs. Mullens or to Berry Mullens that his mother was going to be put in jail or words similar to that effect if he didn't cooperate, that is not a promise, is it, or a threat? A. I don't consider it a threat or a promise.

Q. How about the fact his mother would not be prosecuted for the crime of criminal possession of the alleged counterfeit money, is that a promise? A. That was him doing all the dealing. I just agreed with him. He is the one brought it all up.

S. J. Zona, for Government, Cross.

Q. But it was a promise or would you call it a promise or not? A. Yes.

Q. Okay. Agent Zona, did you ever talk to the informant personally on this particular case? A. Yes.

Q. Of Agent Hunter? A. Yes.

Q. Did this informant tell you that he or she saw the goods at these particular premises? [120] A. No.

Q. Did they tell you they didn't see them there? A. No.

Q. Did they tell you that Greene Berry Mullens had them in his possession, is that right? A. I never talked to them about the case at point.

Q. But you talked to the informant? A. Yes, I have.

Q. Before or after? A. After.

Q. Your department didn't do any independent investigation on this matter before the search warrant was issued, did it? A. No.

Q. You didn't conduct a surveillance to see if known counterfeiters were coming and going from 1536 Jefferson Avenue, did you? A. No.

Q. You didn't in fact inquire on the street whether in fact Greene Berry Mullens was passing counterfeit money, did you? A. No.

Q. So in essence you didn't know whether Greene Berry Mullens was involved in any crime at this particular time, is that correct? [121] A. That's correct.

Mr. Lalime: I have no further questions.

S. J. Zona, for Government, Re-direct.

RE-DIRECT EXAMINATION by Mr. Williams:

Q. Mr. Zona, you indicated you talked to Mr. Hunter's informant, is that correct? A. Yes.

Q. And what was the subject matter of your conversation? A. Reward.

Q. Did you ever discuss the facts of this particular case with that informant?

The Court: Is this before or after the search warrant?

By Mr. Williams:

Q. Okay. Before the issuance of the search warrant, did you talk to Mr. Hunter's informant? A. No, sir.

Q. Did you talk to the informant after? A. Yes, sir.

Q. And when was that, what day? A. I talked to him on two occasions. The first time I would say just prior to Christmas. I do not recall the date.

Q. Did you discuss the facts of this particular case with that informant?

* * *

Decision and Order.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREENE BERRY MULLENS,

Defendant.

CR-1973-375

Appearances:

John T. Elfvin, Esq., United States Attorney (Roger P. Williams, Esq., of Counsel), Buffalo, New York, for the Government.

Thielman & Lalime (James L. Lalime, Esq., of Counsel), Buffalo, New York, for Defendant.

On October 4, 1974 the court entered an order suppressing evidence seized as a result of a search, based on a search warrant issued by a Buffalo City Court Judge. The court determined that the affidavit submitted in support of the application for the search warrant was insufficient.

The government has now moved to reopen the hearing in order to submit testimony of the Judge about the conversation he had with Detective Sergeant James E. Hunter when he made the application for the search warrant.

Decision and Order.

According to the government, when Sergeant Hunter appeared before the City Court Judge his affidavit revealed that the informant told Sergeant Hunter that the defendant had "several hundred \$10.00 bills counterfeit that he is attempting to sell and pass the same." This court held that the information was insufficient because there was no way of determining from the affidavit how the informant knew that the money was counterfeit. In the government's application for reopening, it represents that if the City Court Judge testified, he would say that he never considered the underlying facts as to how the informant knew the money in question to be counterfeit to be crucial because Hunter told him that Greene Berry Mullens offered to sell money to the informant. The government argues that the money must be counterfeit, for who would offer to sell genuine money.

Rule 41(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. . . . Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

It is clear from the application made by the United States that unfortunately the State Court Judge in this instance did not comply with the requirement of the federal

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rule. If the Judge considered additional oral information not included in the affidavit, a record should have been made. *United States v. Abbarno*, 342 F.Supp. 599, 609 (W.D.N.Y. 1972); *United States v. Sterling*, 369 F.2d 799, 802, n.2 (3d Cir. 1966), and *United States v. Melville*, 309 F. Supp. 829, 832 (S.D.N.Y. 1970). Since it was not, no purpose would be served by reopening the hearing. The motion to reopen is denied. The parties are directed to file briefs as provided in the order of October 4, 1974 not later than February 3, 1975.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: January 3, 1975.

AFFIDAVIT OF SERVICE BY MAIL

State of New York) RE: U. S. A.
County of Genesee) ss.: v
City of Batavia) Greene Berry Mullens
Docket No. 74-2479

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 17 day of January, 1975
I mailed 2 copies of a printed Brief and ~~an~~ Appendix
the above case, in a sealed, postpaid wrapper, to:

Roger P. Williams, Esq.

Assistant U. S. Attorney

502 U. S. Courthouse

Buffalo, New York 14202

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

James L. Lalime, Esq.

1710 Liberty Bank Building, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

17 day of January, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975

